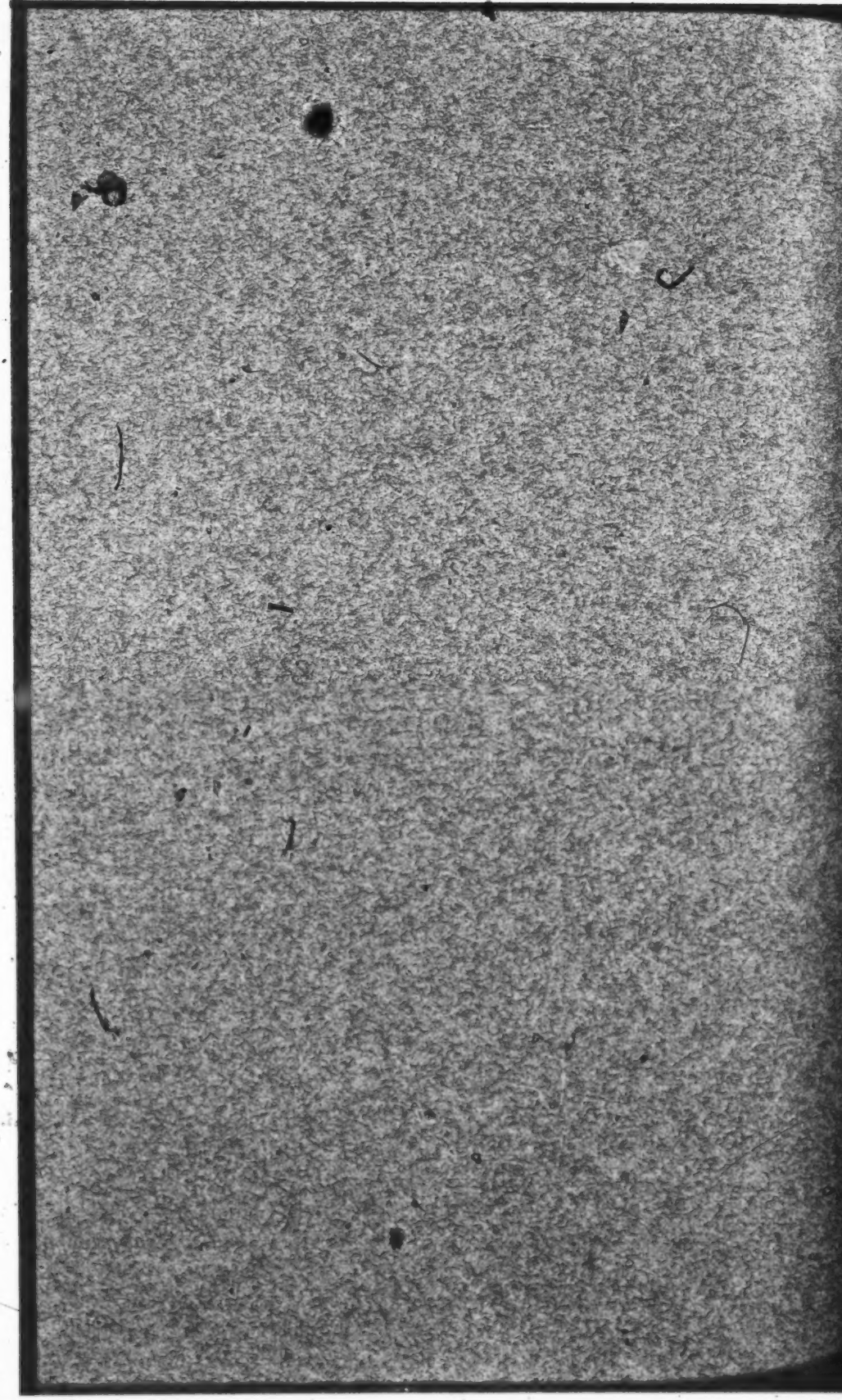

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No. 263

In the Supreme Court of the United States

OCTOBER TERM, 1930

MAAS & WALDSTEIN COMPANY, PETITIONER

v.

THE UNITED STATES

ON A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

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OPINION BELOW

The opinion of the Court of Claims (R. 25–30) is reported in 68 C. Cls. 613 and in 37 F. (2d) 196.

JURISDICTION

The judgment of the Court of Claims was entered on December 9, 1929. (R. 30.) A motion for a new trial was overruled on April 7, 1930. (R. 31.) The petition for certiorari was filed on July 7, 1930 (R. 31), and the writ was granted on October

13, 1930 (R. 33). The jurisdiction of this Court rests on Section 3(b) of the Act of February 13, 1925.

QUESTION PRESENTED

Whether the petitioner is entitled to interest on a refund of excess profits taxes for the year 1917 from the date of payment of such taxes to the date of allowance of the refund, on the ground that its request for special assessment was "a specific protest" within the meaning of Section 1324(a) (1) of the Revenue Act of 1921.

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved are set forth in the Appendix, *infra*, pp. 10–12.

STATEMENT

On March 28, 1918, the petitioner filed its income and excess profits tax return for the year 1917. (R. 20.) Attached to the return was a request for special assessment under the applicable provisions of the Revenue Act of 1917. (R. 8, 21.) On June 20, 1918, petitioner paid the taxes for 1917 and at the same time forwarded to the Collector a letter dated June 14, 1918, renewing the request for a special assessment. (R. 10, 21.) On December 30, 1921, the petitioner filed a claim for refund of a part of these taxes. (R. 21.) On April 15, 1922, the Commissioner approved a schedule of overassessments embracing an overpay-

ment in favor of petitioner of $462,038.34 (R. 22), thus granting the taxpayer's request for a special assessment. This sum was paid to the petitioner without interest. (R. 24.) This suit was brought to recover interest on the amount so refunded.

SUMMARY OF ARGUMENT

The petitioner can not recover interest on the amount refunded to it unless it complied with the statutory requirements prescribed by Section 1324 (a) (1). The letter of March 28, 1918, requesting a special assessment expressed no objection to payment of the tax assessed under Section 201 of the 1917 Act, but, on the contrary, tacitly admitted that the petitioner was under obligation to pay such tax. Moreover, there was no illegality against which protest could be made, since the allowance of special assessment was entirely within the discretion of the Commissioner. Payment was, therefore, not made under protest.

Even if the letter requesting special assessment be construed as a protest, it was not a specific protest within the meaning of Section 1324 (a) (1). It did not set forth sufficient facts to enable the Commissioner to determine whether the petitioner should be granted a special assessment.

ARGUMENT

In the Court of Claims the petitioner contended that, even if its request for special assessment was not a specific protest within the meaning of Section

1324 (a) (1), nevertheless such request amounted to an informal claim for refund, entitling it to interest from six months after the date of filing such claim under Section 1324 (a) (3). This contention has now been entirely abandoned by petitioner, which relies solely on the proposition that its request for special assessment was a specific protest against payment of the tax as computed in the return filed March 28, 1918. (Brief, pp. 4–5.)

I

THE PETITIONER'S REQUEST FOR A SPECIAL ASSESSMENT DID NOT CONSTITUTE A PROTEST WITHIN THE MEANING OF SECTION 1324 (a) (1)

In the Revenue Act of 1921 Congress for the first time made provision for the allowance to taxpayers of interest on taxes refunded or credited to them. As a prerequisite to the recovery of such interest from the date of payment of the tax, Section 1324 (a) (1) of the 1921 Act (*infra*, p. 11) required that the taxpayer should have made payment "under a specific protest setting forth in detail the basis of and reasons for such protest." The right to recover is conditioned upon compliance with the statutory requirements. *Girard Trust Co.* v. *United States*, 270 U. S. 163; *United States* v. *Magnolia Petroleum Co.*, 276 U. S. 160.

The petitioner contends that its letter of March 28, 1918, requesting the Commissioner of Internal Revenue to grant it a special assessment constituted a specific protest within the meaning of the

act. The Court of Claims held that this letter was not a protest (a) because it did not, in fact, state that the petitioner objected to paying the tax, and (b) because a protest must be directed to an illegal collection, whereas all that was requested was the exercise of the Commissioner's discretion in a matter wherein his decision was final and conclusive. The decision below is in accord with an early ruling of the Treasury Department holding that an "application for special assessment * * * does not in itself constitute a sufficient specific protest to meet the requirements of Section 1324 * * *." Income Tax Decision 1335, published in I–1 Cumulative Bulletin (January–June, 1922) p. 404. See also Solicitor's Memorandum 2113, published in III–2 Cumulative Bulletin (July-December, 1924) p. 352.

It is obvious that payment is not made under protest unless the protest antedates or is contemporaneous with payment. Petitioner's letter of March 28, 1918, antedated payment, and the letter of June 14, 1918, accompanied the check. But neither of these letters indicated that the petitioner was affirmatively objecting to making payment. The letter of March 28 (R. 8) clearly admitted liability for the amount of tax set forth in the return and requested that the petitioner be given special consideration in the Commissioner's discretion. We submit this does not have the force of a protest as that term is understood in relation to taxation.

In *Girard Trust Co.* v. *United States*, 270 U. S. 163, *supra*, this Court said (p. 173):

> A protest is for the purpose of inviting attention of the taxing officers to the illegality of the collection, so that they may take remedial measures at once.

The court below considered that assessment and collection of the tax under Section 201 of the Revenue Act of 1917 would not have been illegal had the Commissioner refused to grant the petitioner's request for a special assessment. That section imposed an excess-profits tax upon "every corporation, partnership, or individual" and specified the manner in which such tax should be computed. Section 210 (*infra*, pp. 10–11) contained provisions for relief in certain exceptional cases, providing—

> That if the Secretary of the Treasury is unable in any case satisfactorily to determine the invested capital,

certain deductions should be made.

The language of the section seems to indicate that it was designed primarily to aid the collecting officials in cases in which by reason of exceptional circumstances they were unable to compute accurately the amount of the taxpayer's invested capital. No provision was made for special assessment on the initiative of the taxpayer nor for protest against, or claim for refund of, a tax assessed under Section 201. But Article 52 of Regulations 41 (*infra*, pp. 11–12), promulgated under the Revenue Act of

1917, permitted the taxpayer to "submit to the Commissioner of Internal Revenue evidence in support of a claim for assessment under the provisions of section 210."

In requesting such special assessment, the taxpayer was not objecting to an illegal collection. It paid the tax, tacitly conceding that Section 201 compelled it to do so, but asked for a reduction in the amount of such tax, not on the ground that it was legally entitled to a reduction, but on the ground that it would otherwise suffer undue hardship as compared with other organizations engaged in a similar business. We submit that this was not a protest but was merely, as the letter indicates, a request for special consideration, the granting of which was entirely within the discretion of the Commissioner.

When the petitioner filed its return and paid the tax, there was no statute giving it the right to receive interest on an overpayment. Consequently, it could not have had in mind the necessity of protesting payment as a prerequisite to recovery of interest, nor would a protest have availed to lay the foundation for a subsequent suit against the Government, since this Court has held that the Court of Claims has no jurisdiction to review the conclusions of the Commissioner with respect to special assessments. *Williamsport Wire Rope Co. v. United States*, 277 U. S. 551. The purpose of the

letter of March 28, 1918, was merely to bring to the attention of the Commissioner, as required by Article 52 of Regulations 41 (*infra*, pp. 11-12), circumstances which, the petitioner considered, entitled it to preferential treatment.

II

EVEN IF PAYMENT OF THE TAX WAS MADE UNDER PROTEST, THAT PROTEST WAS NOT SUFFICIENTLY SPECIFIC TO COMPLY WITH THE REQUIREMENTS OF THE STATUTE

In *Girard Trust Co.* v. *United States*, 270 U. S. 163, *supra*, this Court said (p. 172) that the provisions of Section 1324 were—

> intended to favor those who furnished to the collecting officers by way of specific protest a valid basis for a refund of the taxes.

The petitioner stated in its letter of March 28, 1918, that the basis of its request for a special assessment was paragraphs 3 and 4 of Article 52 of Regulations 41 (*infra*, p. 12). That article merely describes in general terms the cases in which special assessments may be allowed. It further provides that the taxpayer shall submit evidence in support of its claim. The letter gave the taxpayer's net income for 1917 and stated that its various Federal taxes amounted to about 66% of that net income and that it believed that its tax was "proportionately larger than that of other representative concerns in the same line of business." It

expressed the opinion that the disproportion arose "from causes of the nature of those specified in Article 52 of Regulations No. 41" for the reason that the value of its tangible assets had been reduced in accordance with the regulations to $100,000, a figure believed to be far lower than their actual value, and that about 90 per cent of its total net income was derived from the operation of a guncotton plant which would not be needed for the purposes of its trade or business after the termination of the war, and that the regulations did not permit the taxpayer to take proper allowances "for the amortization and exceptional depreciation of this plant." (R. 8–9.)

The certificate of overassessment (R. 13) indicated that the refund had been determined on the basis of the facts set forth in the statement filed with the return, "together with other data submitted and in connection with the recommendation of the Committee on Appeals and Review." The nature of the other data and the date of their submission do not appear in the record, but it seems probable that no determination of the petitioner's eligibility for special assessment could have been predicated upon the scant information set forth in the letter of March 28, 1918. We submit, therefore, that the payment was not made under the kind of protest which this Court has held to have been contemplated by Section 1324 (a) (1).

CONCLUSION

The judgment of the Court of Claims should be affirmed.

Respectfully submitted.

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MARCH, 1931.

APPENDIX

STATUTES AND REGULATIONS INVOLVED

STATUTES

The Revenue Act of 1917, c. 63, 40 Stat. 300, 303, 307, provides in part as follows:

> SEC. 201. That in addition to the taxes under existing law and under this act there shall be levied, assessed, collected, and paid for each taxable year upon the income of every corporation, partnership, or individual, a tax (hereinafter in this title referred to as the tax) equal to the following percentages of the net income:
>
> * * * * *
>
> SEC. 210. That if the Secretary of the Treasury is unable in any case satisfactorily to determine the invested capital, the amount of the deduction shall be the sum of (1) an amount equal to the same proportion of the net income of the trade or business received during the taxable year as the proportion which the average deduction (determined in the same manner as provided in section two hundred and three, without including the $3,000 or $6,000 therein referred to) for the same calendar year of representative corporations, partnerships, and individuals, engaged in a like or similar trade or business, bears to the total net income of the trade or business received by such corporations, partnerships, and individuals, plus (2) in the case of a domestic corporation $3,000, and in the case of a domestic partnership or a citizen or resident of the United States $6,000.
>
> For the purpose of this section the proportion between the deduction and the net income in each trade or business shall be

determined by the Commissioner of Internal Revenue in accordance with regulations prescribed by him, with the approval of the Secretary of the Treasury. In the case of a corporation or partnership which has fixed its own fiscal year, the proportion determined for the calendar year ending during such fiscal year shall be used.

Section 1324 (a) of the Revenue Act of 1921, c. 136, 42 Stat. 227, 316, provides:

SEC. 1324. (a) That upon the allowance of a claim for the refund of or credit for internal revenue taxes paid, interest shall be allowed and paid upon the total amount of such refund or credit at the rate of one-half of 1 per centum per month to the date of such allowance, as follows: (1) if such amount was paid under a specific protest setting forth in detail the basis of and reasons for such protest, from the time when such tax was paid, or (2) if such amount was not paid under protest but pursuant to an additional assessment, from the time such additional assessment was paid, or (3) if no protest was made and the tax was not paid pursuant to an additional assessment, from six months after the date of filing of such claim for refund or credit. The term "additional assessment" as used in this section means a further assessment for a tax of the same character previously paid in part.

REGULATION

Article 52 of Regulations 41, promulgated February 4, 1918, under the Revenue Act of 1917, provides as follows:

ART. 52. *Scope of section 210.*—Section 210 provides for exceptional cases in which the invested capital can not be satisfactorily

determined. In such cases the taxpayer may submit to the Commissioner of Internal Revenue evidence in support of a claim for assessment under the provisions of section 210. (See articles 18 and 24.) Such exceptional cases may consist, among others, of the following:

(1) Where, through defective accounting or the lack of adequate data, it is impossible accurately to compute invested capital.

(2) Where upon application by a foreign taxpayer the Secretary of the Treasury finds that the expense of securing the data necessary for the computation of the invested capital would be unreasonable in view of the amount of tax involved, or that it is impracticable to determine either the "entire invested capital" or the "entire net income."

(3) Long-established business concerns which by reason of ultraconservative accounting or the form and manner of their organization would, through the operation of section 207, be placed at a serious disadvantage in competing with representative concerns in a like or similar trade or business.

(4) Where the invested capital is seriously disproportionate to the taxable income. Such cases may arise through:

(*a*) The realization in one year of the earnings of capital unproductively invested through a period of years or of the fruits of activities antedating the taxable year; or,

(*b*) Inability to recognize or properly allow for amortization, obsolescence, or exceptional depreciation due to the present war, or to the necessity in connection with the present war of providing plant which will not be wanted for the purposes of the trade or business after the termination of the war.

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